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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 394

HERMAN DAVID,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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To The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Herman David, prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENT AND OPINION OF THE COURT BELOW

The judgment of the United States District Court for the Northern District of Illinois, Eastern Division, was

entered on November 19, 1956, and is not reported but appears in the printed Report of Proceedings before the Court of Appeals for the Seventh Circuit, filed herewith, and certified by the Clerk of said Court, at page 88 of the Transcript of Record.

The Opinion of the United States Court of Appeals for the Seventh Circuit, affirming said judgment, was filed June 20, 1957, and is not yet reported but is set forth in the Appendix hereto and in the certified copy of the record.

JURISDICTION

On July 23, 1957, it was ordered that the Petition for Rehearing be denied (The orders of the Court of Appeals appear in the Appendix to this Petition). This Petition is filed within thirty days of the denial of the Petition for Rehearing in the United States Court of Appeals for the Seventh Circuit. The jurisdiction of this Court is invoked under Title 28 U.S.C., Section 1254(1), 62 Stat. 928.

QUESTIONS PRESENTED

1. Whether Government agents have probable cause to search a parked automobile without a search warrant or warrant for petitioner's arrest upon the ground that they had received information "from a reliable source," that the petitioner was delivering alcohol to a certain address known to them as the residence of a known bootlegger, that they knew petitioner had been convicted for possession of alcohol "quite some time back," and that the parked car was in the immediate vicinity of the residence of the "known bootlegger," but they had no actual knowledge on the day of the search that the petitioner would or did carry alcohol in his automobile.

2. Whether the result of an unlawful search and seizure converts it into a lawful one.

3. Where the Government refuses or fails to produce evidence exclusively under its control, concerning which there is a material conflict between the Government and the petitioner, does not a presumption arise that such evidence, if produced, would be unfavorable to the Government and favorable to the petitioner?

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Pertinent Sections of Statutes involved herein and in force on the date the crimes are alleged to have been committed, as charged in the Indictment, are as follows:

Section 2800(a)(1), Title 26, U.S.C.A. (Internal Revenue Code of 1939, as amended, volume, page 724):

> "There shall be levied and collected on all distilled spirits in bond or produced in or imported into the United States an internal revenue tax at the rate of $10.50 on each proof gallon or wine gallon when below proof and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon, to be paid by the distiller or importer when withdrawn from bond. On and after April 1, 1955, the rate of tax imposed by this paragraph shall be $9 in lieu of $10.50."

Section 2803(a), Title 26, U.S.C.A. (Internal Revenue Code of 1939, as amended, volume, page 734-735):

> "§2803. Stamps for containers of distilled spirits
>
> "(a) Requirement. No person shall transport possess, buy, sell, or transfer any distilled spirits, unless

the immediate container thereof has affixed thereto a stamp denoting the quantity of distilled spirits contained therein and evidencing payment of all internal-revenue taxes imposed on such spirits."

• • •

"(g) Any person who violates any provision of this section, • • • shall on conviction be punished by a fine not exceeding $1,000, or by imprisonment at hard labor not exceeding five years, or by both."

Section 3321, Title 26, U.S.C.A. (Internal Revenue Code of 1939, as amended, volume, page 869):

"§ 3321. Removal or concealment with intent to defraud the revenue

"(a) Penalty. Every person who removes, deposits, or conceals, or is concerned in removing, depositing, or concealing any goods or commodities for or in respect whereof any tax is or shall be imposed, with intent to defraud the United States of such tax or any part thereof, shall be liable to a fine of not more than $5,000 or be imprisoned for not more than 3 years, or both."

STATEMENT OF THE CASE

The petitioner was convicted of the violation of Section 2803(a), Title 26, U.S.C., and of Section 3321(a), Title 26, U.S.C., as the same existed during the year of 1953. Prior to the trial the petitioner filed a petition to suppress certain evidence, five gallons of distilled spirits. The petition alleged that on November 20, 1953, while petitioner was seated in an automobile on the southeast corner of 45th Street and Vincennes Avenue, in Chicago, Illinois, two Alcohol Tax Unit Agents, Fred D. Roseboro and Carl Hambach, searched said automobile, and found and seized five one-gallon glass jugs containing alcohol, which jugs were in two shopping bags on the floor of the automobile back of the driver's seat. At the said time the agents did not have a warrant for petitioner's arrest, nor a search warrant to search either him or the automobile, nor any other process.

The petitioner further alleged that said search and seizure was not made pursuant to and incidental to a lawful arrest, and that the agents did not have sufficient knowledge of facts or circumstances to believe that the laws of the United States of America were then and there being violated.

A hearing was had on the motion to suppress and the Court denied the same. When the cause came on for trial, petitioner waived a trial by jury, and on stipulation of the parties, by their attorneys, it was ordered that the evidence which had been presented on the foregoing motion to suppress evidence "shall be submitted to the Court as evidence on the question of the guilt or innocence of the defendant." On November 19, 1956, the Trial Court found the petitioner guilty and sentenced him to two years' imprisonment.

Count I of the Indictment charges that the petitioner, Herman David, on November 20, 1953 did unlawfully have in his possession five gallons of distilled spirits, the immediate containers of which did not have affixed thereto stamps denoting the quantity of distilled spirits contained therein and evidencing payment of all internal revenue taxes imposed upon such spirits, as required by law; in violation of Section 2803(a), Title 26, United States Code.

Count II charged that the petitioner, on said date did unlawfully and willfully remove, deposit and conceal certain goods and commodities, to-wit, five gallons of distilled spirits, for and in respect whereof a tax was then and there imposed, with intent to defraud the United States of such tax; in violation of Section 3321(a), Title 26, United States Code. (R. 10).

EVIDENCE

The evidence consisted of the testimony of the petitioner, Herman David (R. 33-42) and four Government witnesses: Agent Carl G. Hambach (R. 42-62), Agent Fred D. Roseboro (R. 62-72) and Agent Columbus Fletcher (R. 72-84).

Herman David, the petitioner, testified that on November 20, 1953, at 10:30 A.M., he parked his car at 45th Street and Vincennes Avenue, Chicago. A man came up to him and told him that he was under arrest. He had no warrant of arrest with him nor a search warrant (R. 34). The petitioner had five one-gallon jugs containing spirits in the back of the car. These jugs were about 11 inches high and were in shopping bags. The tops of the bags were about 8 to 10 inches above the tops of the jugs. Paper was on top of the jugs, which were not visible to anybody who might look into the bags (R. 34). The man who arrested petitioner took the automobile and the jugs with him. Petitioner parked the car because it seemed as if a tire was going flat. He was not about to make a delivery of alcohol to 4502 South Vincennes Avenue (R. 38, 39).

Carl G. Hambach, an Agent of the Alcohol Tax Unit, testified that he had occasion to make an investigation of Herman David, first beginning in the latter part of February or the first part of March, 1953 (R. 43). He saw David on November 6th, 12th, 13th and 20th, 1953 (R. 44). On November 6th he was watching David's home in Dolton and saw him leave in a Packard automobile, accompanied by a lady and a Boxer dog. He followed the automobile and dropped him at South Park and 45th Street. There he contacted Investigator Fletcher on the radio (R. 44, 45).

Hambach further testified that he saw the petitioner around the latter's home in Dolton on November 12th and 13th, followed him, but lost him in town and did not see where the petitioner went (R. 45). On November 20th he saw the petitioner park his car at the curb on 45th Street and Vincennes Avenue, and talk to Investigator Roseboro. Through the window he was able to see in the back of the car a paper bag that contained three one-gallon glass jugs. Investigator Roseboro *had taken* the cap off one of them and tasted it and said "It's alcohol." Hambach then said to David, "You're under arrest" (R. 46).

Hambach further testified that he knew that the petitioner had been arrested several times, and, over objection, was permitted to testify that David was convicted for possession of alcohol "quite some time back" (R. 47). He was asked, on direct examination, whether the neighborhood of 45th and Vincennes meant anything to him and, over objection, he stated that on the second floor at 4502 Vincennes Avenue, a man known as Big John has operated a speakeasy for several years, and the place had been raided and seizures made there several times. The Court stated, on motion that this testimony be stricken, that he would review it later. The witness never saw the petitioner at 4502 South Vincennes (R. 49).

Hambach testified further, on cross examination, that Investigator Fletcher took samples from the jug, and the rest of the alcohol and jugs were destroyed (R. 50). He did not attach any importance to the fact that there might be some conflict between his testimony and that of Mr. David with respect to the height of the bottle and the height of the top of the bags (R. 50).

On further cross examination, the witness testified that he *suspected* the petitioner was going to deliver *something* to 4502 Vincennes Avenue, but did not wait to see whether he would get out of the car and take any alcohol up to 4502 Vincennes Avenue and arrest him there, because when he got to 45th and Vincennes Investigator Roseboro was already at the car (R. 52, 53). At the time of the arrest of the petitioner, he had neither a warrant for Mr. David's arrest nor did he have a search warrant in his possession (R. 55). He saw a bag with the three one-gallon glass jugs in it. The bags were about two feet high. The jugs were about 10 to 12 inches high. He could not tell what was in the bottles at the time he looked in the car (R. 58). The liquid was colorless; it might have been water.

Hambach never saw the petitioner go into the place at 4502 Vincennes Avenue (R. 59). He testified that "we had received information from a reliable source that he (David) was delivering alcohol to this address." This reliable source was an informer, Willie Jones. The witness did not know where Willie Jones lived. Jones used to call him from time to time, and he would meet Jones at appointed places on the South Side. Jones did not call the witness on this occasion, November 20, and on that day he had not heard that the petitioner was going to 4502 Vincennes Avenue (R. 59, 60). He first met Jones two or three years ago on the South Side, in a raid; he didn't know where this Willie Jones lives (R. 60, 61). Hambach never

raided the premises at 4502 Vincennes Avenue. He never arrested the man there (R. 61). He has seen the man about the premises. He is a colored man, known as Big John (R. 62).

Fred D. Roseboro, an Agent in the Alcohol Tax Unit, saw the petitioner on November 20, 1953. He didn't see the petitioner prior to that date. On November 20, 1953, he saw David in an old Packard sedan parked near the corner of 45th and Vincennes Avenue. He asked David what he had in the car, and David answered "Nothing." The witness saw two shopping bags on the floor, in the back of the car. He saw the neck of what appeared to be one-gallon glass jugs (R. 64).

He said to David: "You have moonshine in this car. I can see it in the back of the car. I am going to search the car." David asked Rosebor whether he had a search warrant and Roseboro replied, "I don't need a search warrant" (R. 65).

The witness took one jug out of one of the shopping bags, and one out of the other. He unscrewed the top, dipped a finger into the colorless liquid in the jugs and tasted and smelled it, and found it to be distilled spirits. He *then* placed David under arrest (R. 65).

Over objection, Roseboro testified that he knew 4502 S. Vincennes Avenue was the residence of a known bootlegger (R. 66).

On cross examination, the witness testified that he saw the *necks* of two jugs but did not see the liquid at that time (R. 66). He stated to David: "You have moonshine in the car," or "You're transporting moonshine in the car." Roseboro did not see any moonshine in the car at that time or prior thereto (R. 66, 67). He had no search warrant at the time, nor a warrant for the arrest of David. At

the time he either had to taste the liquid or smell it before he knew that distilled spirits were in the car and that is what he did: put his finger in the bottle in order to taste it and to smell it (R. 67).

The witness presumed that the glass jugs were destroyed. They were turned over to Investigator Fletcher. He did not recall ever asking Fletcher where those jugs were, prior to coming to court (R. 67). He estimated the bags as being 10 or 12 inches in height, he did not measure them. The necks of the bottles were about 1½ or 2 inches long. The liquid in the jugs came to the top of the necks of the bottles. The necks are narrow, about 2 inches in height.

Roseboro could not recall ever being at the premises at 4502 S. Vincennes prior to November 20, 1953. He never made an arrest there, nor made a raid prior to November 20, 1953 (R. 70, 71).

Columbus Fletcher, a Government Alcohol Agent, testified that he first saw the defendant on November 6, 1953, parking his car at 45th and Vincennes Avenue (R. 73). After David parked his car he carried two shopping bags into the side entrance of 4502 S. Vincennes Avenue. After a passage of 10 minutes, the witness saw David come out of the building carrying two empty shopping bags; he then saw David drive away (R. 74, 55). On November 20th, he saw the petitioner at 45th and Vincennes at about 10:30 in the morning. He saw Roseboro take one of the jugs from the rear of the petitioner's car, unscrew it, taste and test the content and heard Roseboro say it was moonshine (R. 75). Fletcher testified further that Investigator Hambach came up *then* and told David he was under arrest (R. 75).

On November 6, 1953, Fletcher did not look in the shopping bags that David carried, nor did he attempt to make an arrest at that time (R. 80). Immediately after David entered 4502 South Vincennes Avenue he did not seek a search warrant, nor did he make any arrest at 4502 Vincennes thereafter (R. 80). To his knowledge, nobody else made an arrest (R. 81). At the time David was carrying the bags across the street, on November 6, Fletcher did not try to look into the bags. His duties as an investigator were to seek out information on violations of non-tax paid distilled spirits and to make arrest if the violations occurred in his presense (R. 81).

The petitioner, being recalled, testified that he did not know any person by the name of Willie Jones, nor could he recall ever meeting a person by that name (R. 85).

It was stipulated that if the Government chemist were present he would testify that Exhibit 1, a pint bottle, contained alcohol. This stipulation was subject to the defendant's objection that the evidence is inadmissible because of an illegal search and seizure. The Court overruled the objection and ordered the evidence as stipulated be admitted to evidence (R. 29).

Petitioner's counsel made a motion for judgment of acquittal but the same was denied (R. 30).

The Court then found the petitioner guilty of the charge in the Indictment (R. 30, 88) and ordered the petitioner committed to the custody of the Attorney General for imprisonment for a period of two years (R. 88).

The Court of Appeals for the Seventh Circuit affirmed the judgment of the District. Mr. Justice Major dissented, stating that the federal officers did not have probable cause to search the petitioner's automobile without a warrant.

REASONS FOR GRANTING WRIT

1. The Court of Appeals for the Seventh Circuit in its decision has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, in that its decision is based upon a complete misapprehension of the facts in the case, and has applied a rule of law justifying the search and seizure not justified by the facts.

2. The Court of Appeals for the Seventh Circuit has rendered a decision in conflict with the decisions of the Courts of Appeals for the Second, Fifth, Sixth, Eighth, Ninth, and District of Columbia Circuits.

3. The Court of Appeals has decided a Federal question in a way conflicting with applicable decisions of this Court.

4. The Court of Appeals sanctioned a custom of the Alcohol Tax Unit of destroying evidence, thus depriving defendants of the right and opportunity to have such evidence available in Court to defendants when necessity and justice so required.

ARGUMENT.

I.

There Was No Probable Cause Sufficient To Authorize The Federal Agents To Search Petitioner's Automobile Without A Warrant.

It is manifest from the evidence heretofore related, of the three Investigators for the Alcohol Tax Bureau, that the following facts and situation existed in connection with the arrest of the petitioner, and the search for and seizure of distilled spirits found in his car, on November 20, 1953:

1. None of the Government agents had a search warrant to search the car of the Defendant, nor a warrant for his arrest.

2. None of the investigators had any information from an informer, or otherwise, that the Defendant would have distilled spirits in his possession on November 20, 1953.

3. Prior to the search of the Defendant's car, the agents did not know that distilled spirits were in the car.

4. Roseboro, the agent who made the search, could only see the necks and a couple of glass jugs, and could not see any liquid in the jugs as they rested in shopping bags.

5. The glass jugs were from 10 to 12 inches in height, and the shopping bags which contained them were about 20 inches in height or more.

6. The liquid in the glass jugs was colorless, and without tasting or smelling the contents, could have been water, mineral oil, distilled white vinegar, or any similar colorless liquid.

7. Roseboro had to taste and smell the liquid, by inserting a finger therein, before he knew that the liquid was distilled spirits.

8. The search and seizure was not made as an incident to a lawful arrest; on the other hand, the arrest of the petitioner followed the unlawful search and seizure.

9. The place where the petitioner's car was searched and the alcohol seized was in the immediate neighborhood of a known bootlegger, but none of the agents ever saw him prior to November 20, 1953, nor did they ever raid his premises nor arrest him, nor were they ever on his premises.

The Court of Appeals overlooked most of the foregoing facts and based its decision on the testimony of Government Investigators, who acted on information from a "reliable" source to the effect that the petitioner was delivering alcohol to a speakeasy, put him under surveillance and observed him taking two shopping bags out of the rear of his sedan and enter the "suspect locale," and then shortly emerge carrying two shopping bags. Apparently the "suspect locale" was known by one of the Investigators to have been a second-story speakeasy, which had been raided several times. These were the only facts upon which the Circuit Court of Appeals concluded that there was probable cause for the search of petitioner's car on November 20, 1953, together with the facts recited in the case of *United States* v. *Walker*, a decision of the Circuit

Court of Appeals for the Seventh Circuit, filed June 10, 1957. Since this decision is not reported, petitioner has included the same in his Appendix to this petition. (10-A)

The Court of Appeals has so misapprehended the application of the *Walker* case to the petitioner's case that the situation calls for supervision by the Supreme Court. In the *Walker* opinion, the Court of Appeals for the Seventh Circuit stated (page 12-A of the Appendix):

> "Obviously we must first decide if this arrest of Walker without a warrant was valid in order to determine the legality of the search clearly incidental to that apprehension. No array of authorities is necessary for supporting the familiar rule that lawful arrest is an indispensable condition precedent to a closely allied search and seizure."

Finding that there was a lawful arrest made prior to the search, the Court of Appeals found that the search was incidental to a lawful arrest.

However, in Petitioner's case just the opposite situation existed. Agent Roseboro made the search *first*, and finding that the jugs contained whiskey, Carl Hambach *thereupon* placed David under arrest (R. 65). At this page of the Record we find that Agent Roseboro said, "I am going to search the car." David said, "Do you have a search warrant?" Roseboro said, "I don't need a search warrant." He then took one of the jugs out of a shopping bag, unscrewed the top, dipped his finger into the colorless liquid, and tasted it and smelled it, and found it to be distilled spirits. He found no Revenue Tax Stamps on the jug. He then said to Agent Hambach, "It's whiskey," and Hambach placed David under arrest (R. 65).

In this testimony Roseboro was corroborated by Hambach who testified, "Roseboro had taken the cap off of one of them (glass jugs) and tasted it, and he said, "It's

alcohol,' and he then said to David, 'You're under arrest. Get out of the car' " (R. 46).

Similarly, the third Government Agent Columbus Fletcher, testified that he saw Roseboro unscrew one of the jugs, taste the contents and declare that it was moonshine. At this time Hambach came up and placed the petitioner under arrest. In applying the unreported case of *United States* v. *Farris Walker* to the petitioner's case, it is obvious that the Court of Appeals misapprehended the facts in the petitioner's case and thereby used an inapplicable rule of law to justify the search and seizure in petitioner's case.

The Court of Appeals recited certain facts that the Investigators were aware of, and added "and more," after which they halted the petitioner while he was driving his car. The petitioner's car was already parked near the corner of 45th and Vincennes Avenue when Agent Roseboro identified himself and made the search and seizure (R. 64).

On November, 20, 1953 the date of the search and seizure, the Government agents and investigators did not have any information from any source whatsoever that David was about to carry alcohol in his automobile when he left his home, or that he was to deliver any alcohol to the vicinity of 45th and Vincennes Avenue (R. 59, 60).

The Court of Appeals appears to have erroneously held as a fact that, on November 6, 1953, the petitioner carried *alcohol* in two shopping bags from his automobile to 4502

Vincennes Avenue, because Agent Fletcher testified that he saw the petitioner carry two shopping bags in to the aforesaid premises, and the same appeared to be empty when petitioner came out of those premises. The mere fact that Fletcher did not then and there arrest David and search the bags, and did not cause a search warrant to be issued for the search of the premises at 4502 Vincennes Avenue, not make an arrest at that address (R. 80), is the most convincing evidence that Fletcher had no suspicion or knowledge that the petitioner was carrying alcohol or other contraband in the shopping bags on November 6, 1953. To Fletcher's knowledge, nobody else made an arrest (R. 81). Fletcher's duties as an investigator were to seek out information on violations of non-tax paid distilled spirits and to make arrests if the violations occurred in his presence (R. 81). At no time prior to the search of petitioner's car did the Agents have any knowledge that the petitioner was about to commit a crime or was in the commission of a crime, and, without a warrant of arrest, they could not have legally arrested the petitioner. Therefore, the search was not incidental to a lawful arrest.

Furthermore, the testimony of Hambach and Roseboro, that the building at 4502 Vincennes Avenue was the residence of a known bootlegger and that he had been arrested a number of times and his place raided, is manifestly their personal conclusion. As heretofore shown in the evidence recited, neither Agent Roseboro nor Agent Hambach ever saw this bootlegger, they never personally raided the premises, they never made an arrest there, they were never in the premises, and their testimony with respect to the reputation of the place is worthless. Similarly, the testimony of Agent Hambach, that he received information from a reliable source that the petitioner was delivering

alcohol to 4502 Vincennes Avenue, is a worthless conclusion. It set forth no facts indicating that Hambach had previously tested the informer's reliability. He didn't even know where the informer "Willie Jones" lived (R. 59, 60).

The decision of the Court of Appeals for the Seventh Circuit is in conflict with the decisions of the Courts of Appeals for the Fifth, Sixth, and Ninth Circuits.

In a Fifth Circuit case, *Emite* v. *United States*, 15 F. 2d 623, a search was made of an automobile moving on a public highway; the automobile was stopped by Federal officers. The Fifth Circuit Court of Appeals stated (page 624):

> "The testimony of the witness, not only did not show that, before the search was made, the officers had probable cause to believe that an offense had been committed, but indicated the absence of such probable cause. Probable cause did not exist, unless the facts and circumstances within their knowledge, and of which they had reasonably trustworthy information, were sufficient in themselves to warrant a man of reasonable caution in the belief that intoxicating liquor was being transported in the automobile which they stopped and searched. *Carroll* v. *United States*, 267 U.S. 132, 162, 45 S. Ct. 280, 69 L. Ed. 543, 39 A.L.R. 790; *Pales* v. *Paoli* (C.C.A.) 5 F. (2d) 280."

The Court further found that the testimony indicated that the officers had no knowledge or information of any willful use of the searched car, or that its owner or an occupant of it had committed or intended to commit any criminal offense. The Court further stated that the testimony as to what a Government witness had been told did not indicate that his informant was trustworthy; or that he even claimed to know what he said was true. On the question of the reputation of premises, the Court further held (page 624):

"A search without warrant of an automobile is not justified by a mere suspicion, based on the facts that it came from a small town having the reputation of being a haven for bootleggers, and that it had been seen parked on an ice manufacturer's premises which were said to be used for parking cars which hauled liquor from that place.

"On its face the testimony of the witness negatived the conclusion that, prior to the search of the automobile, the witness or the other officer, by the use of their senses or otherwise, had learned of facts that would warrant a reasonably prudent man in believing that it then was being used in transporting liquor, or in the commission of any other crime. It appearing on the face of the testimony that the knowledge of the witness of the fact that the automobile contained intoxicating liquor was obtained by a search made without a warrant, and without probable cause to believe that a crime was being committed in his presence, that testimony was subject to be excluded on the ground that the knowledge of the witness of the incriminating facts deposed to was obtained by a violation of the constitutional provision against unreasonable searches."

In the petitioner's case, Agent Hambach did not know that the petitioner was going to deliver any alcohol to 4502 Vincennes Avenue. He testified that he was "suspecting" that the petitioner was going to deliver "something" to 4502 Vincennes Avenue (R. 53).

In a Ninth Circuit case, *Brown* v. *United States*, 4 F. 2d 246, an officer, being the only witness at the trial, testified that the plaintiff in error in that case parked his car at the curb of a street, removed a package from the back part of the car and started up the street; the package was not smooth, and from its appearance might contain bottles. He then placed the said plaintiff in error under arrest. Prior to that time the witness had been informed that the plaintiff in error was a bootlegger, and the license number of the car driven by the plaintiff in error had been furnished

him but the source of his information was not disclosed in either case. On another occasion the plaintiff in error had delivered a package at an office building, and the form of the package indicated it might contain two bottles, but what the package contained he did not know. Beyond the foregoing, the officer had no knowledge of any kind, and no information from any source, that a crime *was being* committed in his presence. The Court of Appeals stated (page 246):

> "If, instead, of arresting the plaintiff in error, the officer had presented all the facts within his knowledge and all the information at hand to a magistrate, no magistrate would issue a warrant of arrest for the plaintiff in error; no magistrate would hold the plaintiff in error to answer for a crime before another tribunal; no grand jury would indict; no court would submit the case to a jury; and, if the officer were sued for false imprisonment, no court would instruct that the arrest was justified, assuming all the foregoing testimony to be true. If we are correct in these conclusions, and we see no escape from them, the arrest was without authority of law, and the property wrongfully seized was not admissible in evidence."

In a Sixth Circuit case, *Wisniewski* v. *United States*, 47 F. 2d 825, 826, the facts and conclusions of the Court are as follows:

> "The arresting officers testified that on August 23, 1930, they had been 'informed' that the defendant, who was said to be dealing in intoxicating liquors, was to make a delivery during that forenoon at his meat market at 900 Michigan Avenue in the city of Grand Rapids; that similar information had been received on four previous occasions from the same informer with reference to others, and that it had on each such other occasion proved reliable; and that the delivery was to be made either in a Studebaker sedan bearing license No. 594,190, or in an Essex coach

bearing license No. 594,191. They also testified that before the time in question information had been received from the deputy administrator that defendant was selling whiskey at his meat market.

"*With this information as the basis for suspicion, possibly insufficient in itself to constitute probable cause*, the officers went to the vicinity of defendant's place of business for purposes of observation." (Italics supplied.)

There the officers *saw* the defendant talking to a known bootlegger who handed the defendant a burlap sack and a jug which the defendant placed in his own automobile. Shortly thereafter the officers arrested the defendant in his automobile and found the jug covered by a burlap sack upon the seat. The jug contained whiskey. Because of these additional facts the Court of Appeals affirmed the lower Court's judgment.

In another Fifth Circuit case, *Clay* v. *United States*, 239 F. 2d 196, the Court of Appeals in a lengthy opinion arrived at conclusions opposite to the instant decision of the United States Court of Appeals for the Seventh Circuit, the subject matter hereof.

It seems clear that this Honorable Court must intervene to correct a violation of the Fourth Amendment to the Constitution of the United States, involved in the search of the petitioner's automobile on November 20, 1953, and the seizure of the distilled spirits found therein by Government Alcohol Agents.

II.

The Result Of An Unlawful Search And Seizure Does Not Convert It Into A Lawful One.

The Court of Appeals decided this Federal question in a way conflicting with applicable decisions of this Court. In other words, the Court of Appeals by approving the

search and seizure tacitly held that the results thereof justified the search.

In the case of *Byars v. United States*, 273 U.S. 28, 29, 71 L. Ed. 520, 522, 47 S. Ct. 248, the Supreme Court held:

> "Nor is it material that the search was successful in revealing evidence of a violation of a federal statute. A search prosecuted in violation of the Constitution is not made lawful by what it brings to light; and the doctrine has never been recognized by this Court, nor can it be tolerated under our constitutional system, that evidences of crime discovered by a federal officer in making a search without lawful warrant may be used against the victim of the unlawful search where a timely challenge has been interposed. *Weeks* v. *United States*, 232 U.S. 383, 393, 58 L. ed. 652, 655, L.R.A. 1915B, 834, 34 Sup. Ct. Rep. 341, Ann. Cas. 1915C, 1177; *Gouled* v. *United States*, 255 U.S. 298, 306, 65 L. ed. 647, 651, 41 Sup. Ct. Rep. 261; *Amos* v. *United States*, 255 U.S. 313, 65 L. ed. 654, 41 Sup. Ct. Rep. 266; *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, 391, 64 L. ed. 319, 321, 24 A.L.R. 1426, 40 Sup. Ct. Rep. 182; *Agnello* v. *United States*, 269 U.S. 20, 33 70 L. ed. 145, 149, 46 Sup. Ct. Rep. 4."

Similarly, in the case of *United States* v. *Di Re*, 332 U.S. 581, 595, 92 L. Ed. 210, 220, 68 S. Ct. 22, the Supreme Court stated:

> "The Government's last resort in support of the arrest is to reason from the fruits of the search to the conclusion that the officer's knowledge at the time gave them grounds for it. We have had frequent occasion to point out that a search is not to be made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success.
>
> "We meet in this case, as in many, the appeal to necessity. It is said that if such arrests and searches cannot be made, law enforcement will be more difficult and uncertain. But the forefathers, after consulting

the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment. Taking the law as it has been given to us, this arrest and search were beyond the lawful authority of those who executed them. The conviction based on evidence so obtained cannot stand."

III.

The Court Of Appeals Sanctioned The Destruction Of Evidence By The Alcohol Tax Unit, And By Its Decision Permitted The Said Agency To Refuse And Fail To Produce Evidence Which A Defendant May Deem Necessary To His Defense.

The distilled spirits which were illegally seized were missing at the trial except for one pint, which was preserved for use in the trial of the petitioner. The shopping bags and the glass jugs were missing. The Federal Agents testified that they were destroyed according to custom. The petitioner argued in his Brief filed in the Court of Appeals that it is a strange situation, indeed, that agents can determine what portion of the evidence seized they shall bring into the Court. Certainly, they should not be the judges of what evidence should be retained and produced in Court and what evidence might be destroyed and not produced in Court. The fact that the Alcohol Tax Unit established a custom of destroying evidence which its officers felt might not be needed at the trial is no excuse. The production of the shopping bags and the glass jugs would have shown the relative size of each, and it could have been easily determined at the trial of the petitioner, by placing the jugs within the bags, whether anybody could see even the necks of the glass jugs.

The petitioner cited the case of *Scanlon* v. *United States*, 223 F. 2d 382, 392, holding that where evidence is in the possession of an adverse party, and he fails to produce the same, the presumption arises that the said evidence would be unfavorable to him.

To the foregoing argument, the Court of Appeals commented:

> "*Scanlon* v. *United States*, 223 F. 2d 382 (1st. Cir. 1955) is unconvincing on defendant's theory that failure to produce the jugs and shopping bags in possession of the government gives rise to a presumption that the evidence would have been unfavorable to the prosecution's case. The *government witnesses testified to the destruction of that evidence as was their custom.* Counsel for David does not contest the presence of alcohol, for he so stipulated; the only contention hinges on the size of the bags and jugs. Such flimsy argument fails to destroy the government's case here. *McDonald* v. *United States*, 89 F. 2d 128 (8th Cir. 1937)." (Italics supplied.)

The *McDonald* case, cited and relied on by the Court of Appeals for the Seventh Circuit, did not condone a custom of destroying evidence. It only excused a single "unwise, hasty, unnecessary and improvident act." The persons who destroyed the evidence, in the *McDonald* case, did so unwittingly, and it was never intended to call them as witnesses. The situation is entirely different in the petitioner's case. Hambach, Fletcher and Roseboro knew, or should have known, that they would be the principal witnesses against the petitioner and as experienced investigators they should have known that the height of the bags in which the jugs were contained compared to the height of the jugs, could well determine whether they could actually see the jugs while they were in the shopping bags. More to the point is the case of *United States* v. *Graham*, 102 F. 2d 436.

CONCLUSION.

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

MYER H. GLADSTONE
of Chicago, Illinois
Attorney for Petitioner

APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 11969 SEPTEMBER TERM, 1956—APRIL SESSION, 1957

THE UNITED STATES,
Plaintiff-Appellee,

v.

HERMAN DAVID,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

June 20, 1957

Before MAJOR, FINNEGAN and LINDLEY, *Circuit Judges.*

FINNEGAN, *Circuit Judge.* Much of what we said in our recent opinion reported as *United States* v. *Walker,* No. 11975, June 10, 1957, governs the disposition of this appeal. For again we have the claim made on behalf of a convicted[1] defendant that there was no probable cause sufficient to authorize a search of his automobile by Federal officers acting without a warrant.

A hearing was had on the motion to suppress. The defendant, having waived trial by jury, subsequently stipulated through his counsel with the government that the evidence presented at the suppression hearing should "be submitted to the court as evidence on the question of the guilt or innocence of the defendant."

[1] Under a two-count indictment for violation of 26 U. S. C. § 2803(a) and 26 U. S. C. § 3321(a).

This is an instance where government investigators, acting on information from a reliable source to the effect David was delivering alcohol to a speakeasy put him under surveillance and observed him take two shopping bags out of the rear of his sedan, enter the suspect locale, then shortly emerge carrying two empty shopping bags. Roughly two weeks after that episode, investigators aware of those facts, and more, halted Davis while he was driving his car. These investigators looked through the car window and saw two shopping bags and the necks of what appeared to be 1-gallon glass jugs containing colorless fluid. Roseboro, a government investigator, opened and searched David's car, unscrewed a jug top, dipped his finger into the fluid, tasted and smelled distilled spirits. Internal Revenue Stamps were conspicuous by their absence. Hambach, another investigator who was present at the seizure, knew that David had several times been arrested and once convicted for the unlawful possession of alcohol. The address where David made his first appearance, already noted above, was known by Hambach to have been a second floor speakeasy, which had been raided several times. The strong showing of probable cause dissipates any doubt about the correctness of denying the defense motion to supress the evidence, *United States* v. *One 1946 Plymouth Sedan Automobile*, 167 F. 2d 3 (7th Cir. 1948), see also *United States* v. *Walker, supra.*

Counsel agreed below that if the government's chemist testified, his evidence would establish that the composite sample contained in a one pint bottle was alcohol. *Scanlon* v. *United States*, 223 F. 2d 382 (1st Cir. 1955) is unconvincing on defendant's theory that failure to produce the jugs and shopping bags in possession of the government gives rise to a presumption that the evidence would have been unfavorable to the prosecution's case. The govern-

ment witnesses testified to the destruction of that evidence as was their custom. Counsel for David does not contest the presence of alcohol, for he so stipulated, the only contention hinges on the size of the bags and judge. Such flimsy argument fails to destroy the government's case here. *McDonald v. United States*, 89 F. 2d 128 (8th Cir. 1937).

Judgment affirmed.

MAJOR, *C.J.*, dissenting. In my view, the federal officers did not have probable cause to search defendant's automobile without a warrant. Consequently, the motion to suppress the evidence obtained by such search should have been allowed. I would reverse the judgment.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B.

IN THE

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago 10, Illinois

Thursday, June 20, 1957.

Before

Hon. J. Earl Major, Circuit Judge

Hon. Philip J. Finnegan, Circuit Judge

Hon. Walter C. Lindley, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 11969 vs.

HERMAN DAVID,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, ***Affirmed.***

APPENDIX C.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois

Tuesday, July 23, 1957

Before

Hon. J. Earl Major, Circuit Judge
Hon. Philip J. Finnegan, Circuit Judge
Hon. Walter C. Lindley, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 11969 vs.

HERMAN DAVID,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It is ordered by the Court that the petition for a rehearing in this cause be, and the same is hereby, *Denied.*

APPENDIX D.

IN THE

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 11975. SEPTEMBER TERM, 1956, APRIL SESSION, 1957.

THE UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

FARRIS WALKER,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

June 10, 1957.

Before DUFFY, *Chief Judge*, FINNEGAN and SCHNACKENBERG, *Circuit Judges.*

FINNEGAN, *Circuit Judge.* After a pre-trial hearing on defendant Farris Walker's motion to suppress (Fed. R. Crim. P. Rule 41) physical evidence taken from his person, the motion was overruled because, the trial judge thought Treasury enforcement agent D. Spillane had "reasonable ground" to believe Walker was committing a crime. That ruling is the sole basis put forward for reversal of the judgment entered upon finding Walker guilty by the dis-

trict judge, sitting without a jury, on both counts of a two-count indictment.[1]

Walker testified in support of his motion, grounded on

[1] In substance, count 1 charged that Walker did ". . . then and there knowingly, wilfully, and unlawfully purchase from a person, whose name or names are to the said grand jury unknown, a quantity of a certain narcotic drug, to wit, approximately 343 grains of heroin," and in count 2, "fraudulently and knowingly receive, conceal, buy and facilitate the transportation and concealment after importation into the United States of a quantity of a certain narcotic drug. . . ."

Section 4704(a) of the Internal Revenue Code of 1954, provides in relevant part: ". . . It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax paid stamps from narcotic drugs *shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.*" 68A Stat. 550, 26 U. S. C. § 4704(a). (Italics supplied).

Walker was arrested for allegedly violating the law in force and effect on August 13, 1956. Consequently it will have to be assumed that Count II citing 21 U. S. C. 174 refers to the amendment of 65 Stat. 767 by the Narcotics Control Act of 1956, 70 Stat. 567, approved July 18, 1956, which through its § 105 (70 Stat. 570) provides:

"Section 2(c) of the Narcotic Drugs Import and Export Act, as amended (U. S. C. Title 21, sec. 174) is amended to read as follows:

"'(c) Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

"'Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

"'For provision relating to sentencing, probation, etc., see section 7237(d) of the Internal Revenue Code of 1954.'"

U. S. Const. Amendments[2] IV and V, and Federal agent Spillane gave testimony on behalf of the government on the issue raised by that motion. Adams, the other agent with Spillane at the time Walker was apprehended, did not testify at the suppression hearing. Confining ourselves, for the moment, to evidence adduced at that hearing the operative facts follow.

Walker, who had never been previously arrested, left his home on August 13, 1956 at about 1:30 in the afternoon in his automobile accompanied by two adults [one of whom was Kemp Wallis] and defendant's three-year old grandson. While Walker was proceeding along South Parkway, a public street, in Chicago, Illinois, his automobile was curbed by another vehicle, near 43rd Street, in which Federal agents Spillane and Adams were riding. Walker and all occupants of his automobile were ordered out and told to place their hands on the top of the vehicle and submit to search. Walker testified that one of the officers said that they were under arrest, and when defendant asked the agents "if they had a warrant . . . they said sure . . ."

When Walker asked the reason for his arrest he was told to "keep quiet" and he obeyed. After being searched Walker was jailed and later released on bail. Under questioning of his own attorney, Walker stated that at the time of the arrest, search and seizure, he "was not violating any laws whatever"; "just driving down the street."

Turning now to the testimony given by Agent Spillane for the government during the suppression proceedings,

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[2] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U. S. Const., Amend. IV.

"No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . ." U. S. Const., Amend V.

he stated that on August 13, 1956 "At approximately 12:45 . . . [he] received a telephone call from an informant who . . . [he] had had previous dealings with, who had proved to be a reliable informant. . . ." This testimony about the informant's reliability was stricken on motion by defense counsel so that the substance of Spillane's testimony on this phase of the case results in evidence that he received information concerning the defendant and led him to this point:

> "Upon the conclusion of the conversation I made a check of the files in my office for the name Farris Walker, which check was negative. His name was not in our files.
>
> "The second thing I did, I called the Central Police Station, the Narcotic Detail, and made a check over the telephone on Farris Walker. They gave me a positive check.
>
> "Mr. Turner: [Defense Counsel]: I will object to what they gave him.
>
> "The Court: Sustained."

Asked by the Assistant United States Attorney what he did "next," Spillane testified: "The next thing I did, in the company of Agent Adams I proceeded to my automobile and went directly to the vicinity of 43rd and Forrestville Avenue. I parked my car on the north side of 43rd Street, a short ways east of Forrestville, and at that time I was observing a green 1950 or 1951 Pontiac Sedan that has been previously described to me over the telephone:

> "I stayed in this position for maybe two, maybe one to three minutes, and then I moved the car, my own car, around the corner, went south on Forrestville, passed the Pontiac in question, drove to the intersection of 44th Street and Forrestville, made a U-turn

north on the east side of Forrestville Avenue, where I parked the car. I stayed in the car for approximately three to five minutes, and I was using binoculars at the time, observing this Pontiac, '51 Pontiac. . . ."

"I maintained surveillance on the Pontiac through binoculars for approximately three minutes, about five minutes—I am a little hazy on exactly the time I was watching it, but eventually I saw the defendant, dressed in a brown suit and a panama hat, in company of another man, whom I knew—who we had arrested maybe three weeks prior to this time—a man by the name of Kemp Wallis, and then a third party whom I didn't know, and a little boy. I saw them come around the corner, evidently came from east on 43rd made a right turn there, walked south on Forrestville Avenue to the side of the Pontiac in question. They stood out in front of the Pontiac for a minute or two. They they [*sic*] all got in the car. As soon as they got in the car the driver, who was defendant Farris Walker, backed into the alley, made a U-turn, and was facing south. He backed into the alley, made a turn and proceeded north on Forrestville to the corner of 43rd and Forrestville. He made a left turn and went west on 43rd. . . ."

". . . I was observing the defendant, inasmuch as he answered the description that I had received over the telephone.

". . . As I said, I was observing the defendant; he had a white panama hat and chocolate brown suit, and his description tallied with the description I had previously received."

"By the Witness:

A. Yes, I did have information. The information I had was that defendant would be with Kemp Wallis.

Mr. Turner: I will object to that.

The Court: He has answered the question.

By the Witness:

A. Who I knew from a previous arrest.

By Mr. Makar:

Q. And did you know anything concerning Kemp Wallis?

A. Yes, I knew that I had arrested him.

Mr. Turner: Your Honor, I am objecting. They are not pertinent to the motion to suppress.

By the Witness:

A. I knew Kemp Wallis due to the fact that I had executed a search warrant at 223 Forrestville a few weeks prior to this time and he was in the apartment when we raided this place.

By Mr. Makar:

Q. Did you know as to the relationship that Kemp Wallis had with this particular defendant?

A. Yes, I did. Defendant, I believe, was the ex-husband of a certain Marie Walker. Marie Walker is the sister of Kemp Wallis. Marie Walker is known to our office. We have files on her; the police have files on her. Kemp Wallis we did not have a file on. But as I said he was arrested in Marie Walker's apartment a few weeks prior to the arrest of the defendant."

Continuing his direct testimony, Agent Spillane described how he and Agent Adams followed defendant's car and that at 43rd and South Parkway Spillane pulled abreast of Walker's car; Agent Adams informed Walker that he (Adams) and Spillane were federal narcotic agents. Agent Spillane then stated: "I came out of my car, went over to his car, and asked him if his name was Farris Walker. He said it was. I told him he was under arrest . . ." After that, according to Spillane, he put Walker up against the car with his hands on top of the roof, and

"I made a search for weapons, which is part of our routine, and in searching the defendant, in his right suit coat pocket I found a Phillip Morris cigarette package containing a glassine envelope with a white powder inside it. In his left suit coat pocket I found a cellophane cigarette wrapper containing nine small

pieces of notebook paper, which paper contained a white powder. I asked defendant what the stuff was. He said in substance—he said to me, 'You know what it is. It is stuff. You got me good.'"

Cross-examination of Spillane by defense counsel contains this exchange:

"Q. You didn't hear this man's voice on the telephone, or any other man's voice on the telephone, did you?

A. Only the informer's voice.

Q. Only the informer's voice. Now then, you had no record, there is no record in your department of Farris Walker being a violator of narcotic laws. There was not at the time you received this call from the informer?

A. Not in our department.

Q. Not in your department. That is what I [am] asking you, in your department. So that at the time you went out on the South Side of Chicago you had no knowledge, you knew nothing about Farris Walker, did you?

A. I knew his description.

Q. Of your own knowledge? Wait a minute. You see, I am just asking you a plain question. Maybe I will come back and let you say what you want to say. You had no knowledge of your own about Farris Walker, did you?

A. I don't know him.

Q. You didn't know him, did you?

A. No."

Obviously we must first decide[3] if this arrest of Walker without a warrant was valid in order to determine the legality of the search clearly incidental to that apprehen-

[3] "There is no formula for the determination of reasonableness of the search and seizure. Each case is to be decided on its own facts and circumstances." *Roichia* v. *United States*, 78 F. 2d 966, 969 (9th Cir. 1935).

sion. No array of authorities is necessary for supporting the familiar rule that lawful arrest is an indispensable condition precedent to a closely allied search and seizure.[4]

Several important aspects of the problem now under review were subjected to judicial scrutiny in *United States* v. *Jeffers*, 342 U.S. 48, 51 (1951) where Mr. Justice Clark, writing for the majority, stated:

> "The Fourth Amendment prohibits both unreasonable searches and unreasonable seizures. . . . Over and again this Court has emphasized that the mandate of the Amendment requires adherence to judicial processes. See *Weeks* v. *United States*, 232 U.S. 383 (1914); *Agnello* v. *United States*, 269 U.S. 20 (1925). Only where incident to a valid arrest, *United States* v. *Rabinowitz*, 339 U. S. 56 (1950), or in 'exceptional circumstances' *Johnson* v. *United States*, 333 U.S. 10 (1948), may an exemption lie, and then the burden is on those seeking the exemption to show the need for it, *McDonald* v. *United States*, 335 U. S. 451, 456 (1948). In so doing the Amendment does not place an unduly oppressive weight on law enforcement officers but merely interposes an orderly procedure under the aegis of judicial impartiality that is necessary to attain the beneficient purposes intended. . . . Officers instead of obeying this mandate have too often, as shown by the numerous cases in this court, taken matters into their own hands and invaded the security of the people against unreasonable search and seizure."

Congress has supplied a new factor, in narcotic cases through the vehicle of the Narcotic Control Act of 1956 under § 104(a), of which, power is conferred upon agents

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[4] "When a man is legally arrested for an offense, whatever is found upon his person or in his control which it is unlawful for him to have and which may be used to prove the offense may be seized and held as evidence in the prosecution." *Carroll* v. *United States*, 267 U. S. 132, 158 (1925).

of the Bureau of Narcotics to: ". . . make arrests without warrant for violations of any law of the United States relating to narcotic drugs . . . or marihuana . . . where the violation is committed in the presence of the person making the arrest or where such person has *reasonable grounds* to believe that the person to be arrested has committed or is committing such violation." 70 Stat. 570, 26 U. S. C. § 7607. (Supp. IV, 1957). (Italics ours).

Of course even under a legislative enactment typified by § 104(a) we would refrain from permitting such authority to override constitutional rights and privileges. Use of legislative history requires caution and critical analysis. With that awareness we think § 104(a) reflects Congressional response to the narcotics situation in our country and that, indeed, it is a problem. See *e. g.* Narcotics, 22 Law & Contemp. Problems (1957). Difficulties confronting the law enforcement branches of government charged with enforcing the relevant laws were described in the House Subcommittee Report on Narcotics, 2 U. S. Code Cong. & Adm. News 3302 (1956).

> "Your subcommittee's inquiry into the enforcement program revealed serious obstacles which have been placed in the path of enforcement officers as the result of recent court decisions. These decisions have tended, under certain circumstances, to furnish the criminal with a cloak of immunity to the detriment of society as a whole. They have forced changes in recognized investigative procedures which had been sanctioned by the courts for many years. The narcotics traffickers, who are in most cases well-organized professional racketeers, take full advantage of any limitations placed on enforcement officers.
>
> "In some instances enforcement officers have been restricted in their right to arrest without a warrant, and to search and seize contraband before and after

a valid arrest. The use of evidence of admissions and confessions following an arrest has been curtailed. Narcotic enforcement officers are restrained from intercepting telephone conversations, even though the telephone is a major instrument of communication between the top narcotic traffickers, and could often provide the necessary evidence to convict these violators. The enforcement officers are required to secure an arrest warrant or a search warrant from a magistrate even though circumstances indicate the impracticability of such a procedure. Narcotic drugs are small in volume and high in price. A fortune in drugs can be concealed under clothing and can be destroyed, or moved to a place of safety on a moment's notice. The delay involved in obtaining a warrant from a magistrate permits the destruction or removal of the narcotic evidence and allows the narcotic traffickers to escape prosecution for their crime. These and other restrictions on enforcement officers leave the public unprotected and give narcotic violators, especially the more reprehensible larger racketeers and wholesalers, an advantage over law-enforcement officers in efforts to combat the illicit narcotic traffic. The subcommittee urges that corrective measures in these areas be taken immediately to permit enforcement officers to operate more effectively."

Our decision takes shape against that background but with constitutional rights outweighing any practical considerations which would ultimately generate corrosion of those privileges.

After reversal of the conviction under review in *United States* v. *Coplon*, 185 F. 2d 629 (2d Cir. 1950) Congress amended § 3052 of Title 18 U.S. Code to read: "The Director, Assistant to the Director, Assistant Directors, Inspectors, and Agents of the Federal Bureau of Investigation of the Department of Justice may . . . make arrests without warrant for any offense against the United States

committed in their presence, or for any felony cognizable under the laws of the United States *if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony.*" 64 Stat. 1239, 18 U. S. C. § 3052 (Supp. IV, 1952 ed.) (Italics added). Because the italicized language is now virtually identical with that phraseology used in § 104(a)(2) we thought it significant, especially in light of the legislation following in the wake of Judge Learned Hand's disposition of the Coplon arrest under the earlier version of § 3052. 185 F. 2d 629, 634-635. See also: *Coplon* v. *United States*, 191 F. 2d 749, 753-754 (D. C. App. 1951) decided under the wording of 18 U. S. C. § 3052 as it stood on March 4, 1949. If Judge Hand thought that "the Act of 1934 was intended to be a constitutive, not cumulative, grant of any powers of arrest which the agents were to have," certainly the latest version, paralleled by § 104(a)(2), has eliminated the strictures he found lurking in § 3052. We think *United States* v. *Di Re*, 332 U. S. 581 (1948) is distinguishable because since that decision, Congress enacted a federal rule of arrest for agents of the Narcotics Bureau. Section 104 (a)(2) is the legislative source of power and authority under which the arrest of Walker must be measured. Resort can be made to closely analogous precedent for ascertaining the meaning of "reasonable grounds" in that section.

Reasonable grounds is the precursor to a valid arrest without a warrant under § 104(a)(2) and a subsequent successful search does not cure an otherwise defective arrest. The arrest of Walker must be validated without any resort to the fruits of the search. At the hearing below the trial judge unduly restricted the government's showing because that proceeding in no way concerned the

issue of Walker's guilt or innocence. The key issue at that suppression hearing was whether Spillane had reasonable grounds to believe that Walker had committed or was committing a violation of any law of the United States relating to narcotic drugs. Communication emanting from the informer was relevant to show that Spillane obtained knowledge about Walker forming the foundation on which the agent built his cause for acting. The informer's testimony was not offered at the pre-trial hearing for the purpose of proving Walker guilty of the offenses for which he was about to be tried—the issue at that preliminary stage is related to Spillane's state of mind. See *e. g.* 6 Wigmore, Evidence § 1789 (3rd ed. 1940). We think under the facts developed here, evidence classed as hearsay from Walker's viewpoint, but not Spillane's, can constitute the basis for reasonable grounds leading to an arrest without a warrant.

That Walker's arrest preceded the challenged search is undisputed on the record before us. The Agents stopped Walker's car only because of what the informer related to them, coupled with their check of police records, and not because they were impelled by their observations. Nothing else shows in this record as the basis for apprehending Walker and, of course, the narcotics in his coat pocket were not open to view until Spillane "frisked" Walker. Statutes aside, an arrest without a warrant on bare suspicion unsupported by reasonable grounds is illegal. "Prob-

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[5] *Carroll* v. *United States*, 267 U. S. 132, 161-162 (1925) contains the familiar summary by Mr. Chief Justice Taft, when speaking for the majority of a divided court:

"The necessity for probable cause in justifying seizures on land or sea, in making arrests without warrant for past felonies, and in malicious prosecution and false imprisonment cases has led to frequent definition of the phrase. In *Stacey* v. *Emery*, 97 U. S. 642-645, a suit for damages for seizure by a collector,

able cause" and "reasonable grounds" are concepts having virtually the same meaning.[5] Chief Justice Shaw, speaking for a court reviewing an action for malicious prosecution, wrote in *Bacon* v. *Towne*, 58 Mass. 217, 238-239 (1849): "Probable cause is such a state of facts in the mind of the prosecution as would lead a man of ordinary caution and prudence to believe, or entertain an honest and strong suspicion, that the person arrested is guilty." Even earlier in our judicial history Chief Justice Marshall had already stated this interpretation: ". . . the term 'probable cause',

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(footnote 5 cont.)

this Court defined probable cause as follows:

'If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed, it is sufficient.' *Locke* v. *United States*, 7 Cranch, 339; *The George*, 1 Mason, 24; *The Thompson*, 3 Wall. 155. It was laid down by Chief Justice Shaw, in *Commonwealth* v. *Carey*, 12 Cush. 246, 251 that 'if a constable or other peace officer arrest a person without a warrant, he is not bound to show in his justification a felony actually committed, to render the arrest lawful; but if he suspects one on his own knowledge of facts, or on facts communicated to him by others, and thereupon he has reasonable ground to believe that the accused has been guilty of felony, the arrest is not unlawful.' *Commonwealth* v. *Phelps*, 209 Mass. 396; *Rohan* v. *Sawin*, 5 Cush. 281, 285. In *McCarthy* v. *DeArmit*, 99 Pa. St. 63, the Supreme Court of Pennsylvania sums up the definition of probable cause in this way (page 69):

'The substance of all the definitions is a reasonable ground for belief in guilt.'

In the case of the *Director General* v. *Kastenbaum*, 263 U. S. 25, which was a suit for false imprisonment, it was said by this Court (page 28):

'But, as we have seen, good faith is not enough to constitute probable cause. That faith must be grounded on facts within knowledge of the Director General's agent, which in the judgment of the court would make his faith reasonable.'"

The term "reasonable ground" was subjected to judicial evaluation in *United States* v. *Bell*, 48 F. Supp. 988, 992 (D. C. Calif. 1943) and we think the interpretation sponsored there is sound

according to its usual acceptation; means less than evidence which would justify condemnation; and in all cases of seizure, has a fixed and well-known meaning, it imports a seizure made under circumstances which warrant suspicion. . . ." *Locke* v. *United States*, 11 U.S. 338, 348 (1813).

United States v. *Sebo*, 101 F. 2d 889, 890 (7th Cir. 1939) evoked our court's view: "Probable cause has been defined as reasonable grounds of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the party is guilty of the offense with which he is charged."

When, as here, a search and seizure is intimately related to an arrest without a warrant, the legality of the arrest dictates whether the search is unreasonable and running afoul of the Fourth Amendment. See; *e. g.* J. Hall, Legal and Social Aspects Of Arrest Without A Warrant, 49 Har. L. Rev. 566 (1936); Sam B. Warner, The Uniform Arrest Act, 28 Va. L. Rev. 315, 331 (1942). To evaluate Spillane's action without a warrant requires reaching back behind his reason for categorizing Walker as suspect. The cue to such categorization was supplied by the informer to Spillane who, in turn, used that data, along with other information, for deciding if Walker had committed or was (at that time) committing a violation. Obviously what the informer said became the stimulus input for Spillane and a trial judge should evaluate such evidence when deciding if Spillane acted on reasonable grounds. In *Costello* v. *United States*, 350 U. S. 359 (1956) all of the evidence before the grand jury was in the nature of "hearsay" yet that condition did not invalidate the indictment. The technical rules of evidence regarding hearsay come into greater [illegible]stance at a trial on the merits especially when jurors are participating. But in an instance of the type now before us strict application of the

hearsay[6] rule is a sterile technicality of not an incorrect application of the exclusionary rule. If the government's offer[7] of proof is examined along with those pieces of testimony received below there emerges the requisite reason-

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[6] For example, see: *United States* v. *Li Fat Tong*, 152 F. 2d 650, 652 (2nd Cir. 1945): "But it is contended that it (an arrest without a warrant) was unlawful because based upon hearsay evidence obtained from the Chicago Office (of the Narcotic Bureau) and through informers whose names were not divulged. We recently held, however, in *United States* v. *Heitner*, 149 F. 2d 105, 106 that an arrest may be made upon hearsay evidence, and cited as authority the ruling in *Carroll* v. *United States*, 267 U. S. 132 . . . *Dumbra* v. *United States*, 268 U. S. 435, 441 . . . ; *Husty* v. *United States*, 282 U. S. 694, 700, 701."

[7] "If he would be permitted to testify as to the phone conversation he had with the informer prior to any of the acts which had occurred and about which this witness had testified concerning the arrest and the search of the particular defendant, this witness would testify as to the following:

That he received information from an informer, whom he recognized and had previous dealings with that informer. He recognized that informer's voice. And that the informer told him that this particular defendant, naming him as Farris Walker, also known as Brownie Walker, *had purchased an ounce of heroin* and which did not have any stamp of the Treasury Department of the United States; and that this particular defendant was then in the process of bagging it up, partly by diluting that particular substance which he had just purchased, and was then in the process of diluting it and was going to make a sale of a portion of that substance; that it would not take him more, would not take the defendant more than a half an hour at the most before he would proceed to a 1950 or 1951 Pontiac, with the particular description of being a green automobile, which was parked immediately to the south of the alley just south of 43rd Street and the automobile was facing north. I'm sorry—the automobile was facing south on Forrestville, and would be on the west side of Forrestville; that this particular defendant, Farris Walker, is dressed, and would be dressed in a panama hat and brown suit, and he is described as a very slender man, about five feet five inches tall, weighing about 120 or 125 pounds, and that he would be in the company of one Kemp Wallis, and both of them were in the process of going out and making a sale to another individual. That, incidentally, the particular vehicle did not have any license plates, and that time was eminent insofar as if the agents were going to do anything concerning this particular defendant that he would be leaving in half an hour and he does not know where he would go, nor does he know the address of the particular—where the defendant was staying at the time."

able grounds for Walker's arrest and approval of the search. That defendant was traveling by automobile explains the need for action without a warrant. *Brinegar* v. *United States*, 338 U. S. 160, 175-178.

"Reasonable ground," then, is the litmus paper for testing validity of arrests without a warrant. Implicit in such test is the exclusion of arbitrary and capricious interference with individual freedom. Dignity and sanctity of the individual are not to be jeopardized by the whim or zeal of policemen. Consequently organic law, reflected in the relevant statutes and Rules of Criminal Procedure interposes the judiciary between law enforcement officers and citizens by requiring, as normal procedure, application for warrants and the attendant opportunity for the judicial branch to pass on the question of probable cause. This constitutional insulation against infringing basic rights is removed only under classes of exigencies which have been judicially approved on review and now form a discernible *pattern of instances, excusing law-enforcement officers for* by-passing the requirement of having the judiciary first rule upon the question of probable cause. In those situations the law is adjusted and imposes on the law enforcement agent a standard of discrimination. Rather than blind worship of cause alone, the law probes for the basis of the officer's action measuring it by an external standard. After all when an arrest without a warrant is classed as valid, it simply means such action is judicially tolerated as being within the constitutional bounds of reasonableness as officially or pragmatically defined in case-law. Fresh combinations of facts must necessarily be examined under the terms labelled "probable cause" and "reasonable grounds" for neither one is a static concept. But the criteria embedded in each continues to be one that refuses approval for arrests without a warrant where an officer is stimulated by an inkling only. For he must act as a man

of reasonable caution. "Suspicion" is an elusive word with a wide spectrum of intensities and courts must examine the facts underlying it rather than be deflected by the word itself.

Roviaro v. *United States*, U. S. Supreme Court, No. 58 (March 25, 1957) appears, on cursory examination, to cast a shadow across this opinion. But nothing said there requires any different decision in Walker's case despite the fact that an unnamed informer stimulated the agent's activities in this situation. Counsel for Walker did not request disclosure of the informer's identity, and he would have to make that request to come within this passage by the Roviaro majority:

> "Most of the federal cases involving this limitation on the scope of the informer's privilege have arisen where the legality of a search without a warrant is in issue and the communications of an informer are claimed to establish probable cause. In these cases the Government has been required to disclose the identity of the informant *unless there was sufficient evidence apart from his confidential communication.*" [citing *Scher* v. *United States*, 305 U. S. 251; *United States* v. *Li Fat Tong*, 152 F. 2d 650; *Wilson* v. *United States*, 59 F. 2d 390; and *United States* v. *Keown, et al.*, 19 F. Supp. 639]. (Italics added).

In any event without a proper demand below for the informer's identity* this case is outside the scope of the

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*Nor was there any assertion of privilege on the government's part, in this appeal, as discussed in *Jencks* v. *United States*, No. 23 U. S. Supreme Court, 25 L. W. 4365 (1957). In *Jencks*, after observing that the testimony of Ford and Matusow were crucial to the government's case during the trial of Jencks, it was said for the majority: "We now hold that the petitioner was entitled to an order directing the Government to produce for inspection all reports of Matusow and Ford in its possession . . . touching the events and activities as to which they *testified* at the trial." (Our italics.) We make this mention of the *Jencks* case where numerous requests were made by the defense for the F.B.I. reports, solely for distinguishing it from *Walker* in which no demands of any kind were made of the government by the defense.

Roviaro holding. See *United States* v. *Conforti*, 200 F. 2d 365 (7th Cir. 1953). That *Contee* v. *United States*, 215 F. 2d 324, 326 (D. C. App. 1954) is inapposite is patent from the flimsy testimony given by the arresting officers, in that appeal.

By overruling the motion to suppress, interposed on Walker's behalf, the trial judge reached the correct result, and we affirm the judgment brought here for review.

JUDGMENT AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.